OCBC BANK (MALAYSIA) BHD

v.

STAR EDGE SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN JC
[SUIT NO: 22-55-2000-I]
1 DECEMBER 2003

CIVIL PROCEDURE: *Summary judgment - Triable issues - Banking - Default in repayment of facility - Alleged verbal undertaking to reduce margin of interest - Whether requiring full and serious consideration at trial - Rules of the High Court 1980 O. 14, O. 56 r. 1*

By an agreement dated 8 March 1997 ('the Facility Agreement') the plaintiff granted an overdraft facility of RM4.2 million to the defendants. The defendants defaulted and the plaintiff, having filed its claim thereof, applied for and obtained summary judgment pursuant to O. 14 Rules of the High Court 1980. The defendants appealed and argued that summary judgment was improperly granted as they had raised sufficient triable issues in their defence, namely, that the plaintiff had reneged on its verbal undertaking to reduce the margin of interest charged upon the facility, and that, had it not been for such breach, they would not have been in default at all. The primary issue that arose was whether there was merit in the defence, bearing in mind the facts and the circumstances of the case.

Held (dismissing the appeal and affirming the deputy registrar):

[1] The defendants were under a misconception as to the interpretation to be accorded to cl. 5(5) (variation of interest) of the Facility Agreement. The two limbs of the clause only required that notice be made in writing and effected by the modes as specified therein. Therefore, the defendants' suggestion that the phrase "in such other manner as the Lender may in its sole and absolute discretion deem fit" therein had the effect of allowing the plaintiff to vary the interest verbally was clearly misconceived. Bearing in mind the principle of *ejusdem generis*, the phrase could only mean that the notice of variation need to be effected in a written form, like the form prescribed in items (a) to (e) thereof. (pp 451 e, 452 b-g & 453 a-b)

[2] The facts showed that the plaintiff had always notified the defendants in writing as regards the variation of interest. The defendants had never queried such practice and it would therefore be difficult for the court to believe that the plaintiff had ever made verbal promises or assurance as contended. (p 453 g-h)

[3] There was a certificate of indebtedness clause in the Facility Agreement which would render the amount certified by the plaintiff as conclusive evidence, barring any manifest error. In the circumstances, the defendants' conduct in not disputing the Statement of Accounts must have spoken volumes for their credibility, in the light of contemporaneous documents produced by the plaintiff. (p 455 e-f)

[4] The defendants had not adduced evidence as would entitle them to rely on the defence of promissory estoppel bearing in mind that there was no evidence that the plaintiff had encouraged or induced them by verbal promises or assurances causing the defendants to default. The defendants consequently had failed to show any triable issue or a reasonable probability that they would have a real or *bona fide* defence. (p 456 f)

Case(s) referred to:

Abdul Mulok Awang Damit v. Perdana Industri Holdings Bhd [2003] 3 CLJ 497 CA ***(refd)***

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd [1986] AC 80 ***(refd)***

United Asian Bank v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***

Wong Nget Thau & Anor v. Tay Choo Foo [1994] 4 CLJ 617 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 56 r. l

Other source(s) referred to:

Edinburgh and Dublin, *Paget's Law of Banking*, (1996) London 11th edn, pp. 162 & 164

For the plaintiff - Lam Ko Luen; M/s David Allan Sagah & Teng
For the defendants - Gabriel Wong; M/s Detta Samen & Co

Reported by WA Sharif

JUDGMENT

Lau Bee Lan JC:

This matter emanates from a notice of appeal pursuant to O. 56 r. l of the Rules of the High Court 1980 ("the RHC") filed by the appellants-defendants (hereinafter collectively referred to as "the defendants'" or singularly as the "2nd defendant", "3rd defendant" and "4th defendant" as the case may be) against the learned deputy registrar's decision dated 26 October 2000 allowing the plaintiff-respondent's ("the plaintiff) application for summary judgment under O. 14 of the RHC with costs in terms of the amended writ of summons and amended statement of claim dated 7 September 2001.

The plaintiff's summons in chambers application (encl. 23) is essentially on the ground that the defendants have no defence; whilst the defendants' main bone of contention is that the plaintiff had by verbal promises and assurances to reduce the margin rate of interest charged upon the facility granted to the 1st defendant reneged upon the alleged promises and assurances which in turn means that the 1st defendant has not committed any default under the facility agreement which attract the principle of promissory estoppel and constitute unconscionable conduct on the part of the plaintiff.

The plaintiff's application is supported by the following affidavits:

(1) the affidavit of Nicholas Ting Sze Mieng affirmed on 20 October 2000 ("plaintiff's 1st affidavit") (encl. 23).

(2) affidavit in reply of Foo Chow Lee affirmed on 20 December 2000 ("plaintiff's 2nd affidavit" (encl. 33).

(3) affidavit in reply (2) of Foo Chow Lee affirmed on 12 April 2001 ("plaintiff's 3rd affidavit") (encl. 53).

(4) affidavit of Lim Lean See and Koay Teng Seng affirmed on 15 June 2001 ("plaintiff's 4th affidavit") (encl. 60).

The defendants have opposed the application *vide* the following affidavits:

(a) affidavit in opposition of Ow Eang Yeow affirmed on 6 November 2000 (for 1st defendant) ("1st defendant's affidavit') (encl. 27).

(b) affidavit in opposition of Ow Eang Yeow affirmed on 6 November 2000 (for 2nd, 3rd and 4th defendants) ("2nd, 3rd and 4th defendants' affidavit") (encl. 28).

(c) second affidavit in opposition of Ow Eang Yeow affirmed on 31 January 2001 ("defendants 2nd affidavit") (encl. 43).

(d) affidavit of Chan Meng Ngai affirmed on 18 May 2001 ("defendants' 3rd affidavit") (encl. 57).

(e) affidavit in Reply of Chan Meng Ngai affirmed on 30 June 2001 ("defendants' 4th affidavit") (encl. 65).

(f) third affidavit in opposition of Ow Eang Yeow affirmed on 10 July 2001 ("defendants' 5th affidavit) (encl. 67).

The court has considered the pleadings, the respective affidavits, the submissions (both written and oral) of both the learned counsel and the authorities submitted therein. The court's findings and evaluation include the following:

It is not disputed that the plaintiff's claim is made pursuant to:

(i) a letter of offer dated 17 October 1996 ("the facility letter") and as amended by the plaintiff's letter dated 7 November 1996 (exh. NT1 and NT3);

(ii) a facility agreement (between the 1st defendant as the borrower and the plaintiff as the lender dated 8 March 1997 ("the facility agreement") (exh. NT 4); and

(iii) a letter of guarantee (between the 2nd, 3rd and 4th defendants as guarantors jointly and severally and the plaintiff) dated 12 December 1996 ("the guarantee") (exh. NT5).

Under the said facility letter the plaintiff had approved the 1st defendant's application for an overdraft facility of RM4.2 million subject to the terms and conditions contained in the facility letter and the facility agreement.

The law governing an application under O. 14 is trite and the court is mindful of the principles enunciated and the approaches taken by the courts. In *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 the Supreme Court held:

> Under an Order 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then a judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.
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> (see headnote (2))

In the case of *Wong Nget Thau & Anor v. Tay Choo Foo* [1994] 4 CLJ 617 at pp. 627 to 628 where the evidence is conflicting as in the instant case, his Lordship Ian Chin J has in an illuminating manner stated:

> It is said in *Banque De Paris Et Des Pays-Bas (Suisse) SA v. Costa De Naray and Anor* [1984] 1 Lloyd's Law Report 21, at p. 23:
>
> > It is of course trite law that O. 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in affidavit of a given situation which is to be the basis of a defence does not, *ipso facto*, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants' having a real or *bona fide* defence.
> >
> > I am of the view that in order to look at the whole situation, as the just quoted case says, I must surely go through the affidavits and documentary evidence and I cannot imagine any court doing that cursorily. Though it is trite law that a conflict of evidence ought not to be disposed of on affidavit evidence only, it is also trite law that the affidavit evidence must not be uncritically accepted and this what the Privy Council in *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212 at p. 217 said:
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> > > ... Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbably in itself it may be...
> >
> > Therefore, the affidavit evidence would have to be examined in detail to see if "there is a fair or reasonable probability of the defendants' having a real or *bona fide* defence". I am of the view that the whole of the evidence has to be looked at, even it involves minute examination of documents and facts, if by such exercise the Court can come to a conclusion that there is no fair or reasonable probability of the defendants having a real or *bona fide* defence. The Privy Council in *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1 PC went through the evidence with a fine tooth comb, (that was what the Supreme Court was of the opinion in *Raja Zainal Abidin bin Raja Hj Tachik & 3 Ors v. British American Life & General Insurance* [1993] 2 AMR 36: 2073 SC). I do not see why the Court do that in an O. 14 proceeding. The Court also went through the evidence in *Banque*

De Paris Et Des Pays-Bas (Suisse) SA. v. Costa De Naray and Anor. Case (supra) in considerable detail. I have also gone through the evidence in detail in the case of *Ribu Daya Sdn Bhd v Maisa Ideal Sdn Bhd & 2 Ors.* [1994] 3 CLJ 821. Other Courts appear to have already taken a similar view, like the High Court in Penang in the cases of *Public Finance Berhad v. Lee Bee Rubber Factory Sdn Bhd & 2 Ors* [1994] 2 CLJ 646 and *Suppletchimi a/p Karpaya v. Palmco Bina Sdn. Bhd* [1994] 2 AMR 23:1191. Could it then, after going through the affidavits and documentary evidence and considering the circumstances, be said that there is "a fair or reasonable probability of the defendant having a real or *bona fide* defence? What the Court has to do in order to arrive at that decision is stated by the Supreme Court in *Hasil Bumi Perumahan Sdn Bhd & 5 Ors v. United Malayan Banking Bhd* [1994] 1 CLJ 328 SC, at p. 335, thus:

> It can hardly be emphasized that in order for the Court to arrive at a decision that the defence has merits it must perforce make a reasoned assessment of the justice of the case by forming a professional view of the probable outcome of the case, but this is stating the obvious. It involves a mental process that goes through the mind of a Judge when making a decision in any case, weighing the evidence of a litigant against that of another on the facts alleged by a party against those of the other before finally coming to a decision.

I am of the view that the defendants are under a misconception as to the interpretation to be accorded to cl. 5(5) (variation of interest) in the facility agreement. Clause 5.5 stipulates:

> (5) Notwithstanding the rate of interest, commission, commitment fees, bank charges and such other charges stipulated in Schedule 11 of Clause 5(4), the Lender may at any time and from time to time at its sole and absolute discretion **by notice in writing** to the Borrower of its intention so to do vary the rate of interest, commission, bank charges and such other charges and or the rate of late payment interest payable on any excess sum whether by varying the Base Lending Rate and or the Margin or the entire mode or manner of computation of interest, commission, commitment fees, bank charges and such other charges and any such variation shall take effect as from the date determined or stipulated by the Lender **in such notice**. **Such notice of variation** may be effected by a notification of the variation in the periodic bank statements furnished by the Lender to the Borrower from time to time or by way of a separate written notice signed by any officer of the Lender for the time being or by way of an unsigned notice or letter printed or produced electronically or by mechanical means or by the Lender's computer or by way of advertisement in any newspaper or by

> way of notification at the Lender's premises where the Borrower's account is maintained or in such other manner as the Lender may at its sole and absolute discretion deem fit.
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> (Emphasis added)

I wholly agree with the learned counsel for the plaintiff's submission that this clause comprises two limbs i.e. the first limb requires that the notice must be in writing and the second limb stipulates that the notice may be effected by various modes as specified in the clause which for convenience is categorised as follows:

(a) a notification of the variation in the periodic bank statements furnished by the lender to the borrower from time to time;

(b) by way of a separate written notice signed by any officer of the lender for the time being;

(c) by way of an unsigned notice or letter printed or produced electronically or by mechanical means or by the lender's computer;

(d) by way of advertisement in any newspaper;

(e) by way of notification at the lender's premises where the borrower's account is maintained; or

(f) in such other manner as the lender may as its sole and absolute discretion deem fit.

By virtue of paras. 6.3 and 6.4 of the defendants' reply submission, the defendants appear to suggest that the phrase "in such other manner as the lender may at its sole and absolute discretion deem fit" allows the plaintiff to vary the interest verbally. With due respect to the learned counsel, such an interpretation is totally misconceived as the phrase "in such manner as the lender may at its sole and absolute discretion deem fit" has in my view to be read in accordance with the *ejusdem generis* doctrine. The learned author of *Bindra's* on Interpretation of Statutes at p. 273 has this to say:

> The words *'ejusdem generis'* means 'of the same kind or nature'. The rule of *ejusdem generis* is that where particular words are followed by general, the general words should not be construed in their widest sense but should be held as applying to objects, persons or things of the same general nature or class as those specifically enumerated, unless of course there is a clear manifestation of a contrary purpose.

Although the facility agreement is a contract and not a statute, I respectfully submit that the *ejusdem generis* doctrine is equally applicable.

Hence, based on the said principle the phrase "in such manner as the Lender may at its sole and absolute discretion deem fit" has to be interpreted that the notice of variation has to be effected in a written form like the form prescribed in items (a) to (e) above. Further, I believe I am fortified in my view by the emphasis made in cl. 5(5) with reference to the notice being in writing by the existence of the word **"such"** appearing in two other phrases namely:

(a) "and any such variation shall take effect as from the date determined or stipulated by the lender in **such** notice."

(b) "**Such** notice of variation may be effected by a notification of the variation ..."

By virtue of cl. 5(5) of the facility agreement, it is untenable and unreasonable for the defendants, in particular the 2nd and 3rd defendants being experienced businessmen (being common directors and shareholders of Star Edge Sdn Bhd, Omega Horizon Sdn Bhd and Hotel Rasa Sayang Sdn Bhd) to contend that such reduction in interest could be verbally assured. Further, this lends credence to the fact that the contention of the defendants that the plaintiff made verbal promises as being inherently improbable.

The defendants are aware and acknowledge that variation of interest has to be in writing as they do not dispute the receipt of the letter dated 7 November 1996 (exh. NT3) which in fact is a reply to the defendants' request, *inter alia*, for a reduction of interest from 1.75% to 1.50% above the BLR from the 1st defendant and signed by the 2nd defendant *vide* letter dated 22 October 1996 (exh. NT2). Further, the plaintiffs in exercise of their right under item 2(b) of the letter of offer and cl. 5(5) of the facility agreement revised the margin rate from 1.5% to 2.00% effective from 1 July 1998 which was duly notified to the defendants *vide* letter dated 22 June 1998 (exh. NT6). The defendants' admitted receipt of the notification *vide* para 3(x) of the 1st defendant's defence and counterclaim and the 2nd, 3rd and 4th defendants' defence and para. 5(x) of the 1st defendant's affidavit (encl. 27) and of the 2nd, 3rd and 4th defendants' affidavit (encl. 28). This shows that the plaintiff have duly complied with their contractual obligation and from the beginning have adhered to this practice, and the fact the defendants have not queried the mode of notifying the variation of interest which has been effected in writing, makes it extremely difficult for the court to believe that the plaintiff had made verbal promises or assurances as the defendants contend.

The court also finds it difficult to believe the allegation of a promise in February 1998 to reduce the interest rate applicable to the overdraft facility granted to the 1st defendant to the margin of 1.5% p.a. when in reality the margin rate applicable at the material time was already 1.5% p.a. Such a contention is illogical.

As to the allegation that the verbal promises and assurances by the plaintiff were made on three occasions ie, February 1998, December 1998 and 21 April 1999, to wit, has been denied categorically by the plaintiff and viewing the affidavit evidence, the court is not satisfied that such promises or assurances were made.

The court is mindful of the principle of law relating to the correctness of monthly bank statements to their customers, as is evident from *Paget's Law of Banking*, 11th edn (1996) London, Edinburgh and Dublin at pp. 162 and 164 which states:

> (a) there is no duty on the part of customers to check their monthly bank statements; no estoppel arise from the customer's mere silence;
>
> (b) the continued payment in and withdrawal of monies from a current account even after receipt of a bank statement does not constitute the customer's agreement express or implied, to the balance shown on the statement.

Further in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd* [1986] AC 80 in relation to the bank's term for opening a current account, Lord Scarman on behalf of the Privy Council opined:

> If banks wish to impose upon their customers an express obligation to examine their monthly statements and to make those statements, in the absence of query, unchallengeable by the customer after expiry of a time limit, **the burden of the objection (sic) and of the sanction imposed must be brought home to the customer**. In their Lordships' view the provisions which they have set out above do not meet this undoubtedly rigorous test. The test is rigorous because the bankers would have their terms of business so construed as to exclude the rights which the customer would enjoy if they were not excluded by express agreement. It must be borne in mind that in, their Lordships' view, the true nature of the obligations of the customer to his bank where there is no express agreement is limited to the Macmillan and Greenwood duties. *Clear and unambiguous provision is needed if the banks are to introduce into the contract a binding obligation upon the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts*.
>
> (Emphasis added)

The aforesaid legal proposition is confirmed by the Supreme Court in *United Asian Bank v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31 SC. However, the facts of *Tai Soon Heng Construction Sdn Bhd (supra)* can be distinguished. In that case the respondent was a customer of the appellant bank and had opened an account at the appellant's branch in Kuala Lumpur. The respondent's accounts clerk who was not an authorized signatory to cheques, forged several cheques of the respondent drawn on the appellant bank. All these cheques were honoured by the appellant and the respondent's account with it was debited in consequence. After the forgeries were discovered, the respondent brought an action against the appellant claiming a sum of RM397,660 being the total of the forged cheques which had been met by the appellant. The learned trial judge gave judgment for the respondent and the appellant appealed and which was dismissed. (see headnotes)

In the circumstances of the instant case, the defendants are customers of the plaintiff which provided them with an overdraft facility subject to the terms and conditions contained in the facility letter and facility agreement. Surely if the defendants are relying on the fact that they withheld payments because they allege that they acted on the verbal promises and assurances of the plaintiff, would it not be reasonable for the defendants as prudent businessmen to dispute the statement of accounts which in this case they did not. In my opinion in the context of a banking transaction like in the instant case, the certificate of indebtedness clause meets the requirement of the rigorous test of a clear and unambiguous provision as alluded to by the Privy Council in *Tai Hing Cotton Mill Ltd (supra)*. Thus it is to be borne in mind that there is a certificate of indebtedness clause in the facility agreement and the guarantee (cls. 22 and 22 respectively) which would render the amount certified by the plaintiff as conclusive evidence unless there is manifest error. The conduct of the defendants speak volumes for their credibility in the light of the contemporaneous documents produced by the plaintiff.

The defendants also chose not to reply to the letters of demand to regularise their account *vide* letters dated 12 February 1999, 16 April 1999, 28 May 1999 and 18 June 1999 (exh. FCL4, exh. FCL5 and exh. FCL6). The plaintiff followed up with a letter of demand against the defendants for the excess on 18 June 1999 (exh. NT8(a) to exh. NT8 (dr) and on 29 July 1999 with a letter of recall demanding for the total outstanding balance which the defendants failed to comply (exh. NT9(a) to exh. NT9 (dr). Why did the defendants chose to ignore? If what they contend is genuine, they should as any reasonable man would grab the earliest opportunity possible rather than remain silent and raise it as a defence only when proceedings are commenced against them.

The defendants explained that they did not reduce their complaint in writing because they trusted and were assured that Mr Foo Chow Lee, in his capacity as the vice president and branch manager of the plaintiff and Ms Helen Lim, Senior Vice President of Corporate Banking Division Head Office of the plaintiff were able to and would fulfil and honour the promises and representations made by them and by reason of their position in the plaintiff bank had fully relied on them. In the light of cl. 5(5) of the facility agreement and the written notifications with regard to the variation of the margin rate of interest, it is difficult for the court to accept their explanation, bearing in mind that the 2nd defendant is the company director for three companies and there was no assertion that he was a mere country yokel. (per Richard Malanjum JCA in *Abdul Mulok Awang Damit v Perdana Industri Holdings Bhd* [2003] 3 CLJ 497 at 502.)

In relation to exh. FCL7(18) of plaintiffs 2nd affidavit, the 1st defendant submitted that the amount of RM148,417.50 was credited to the 1st defendant's account as a result of the promise made by Mr Foo Chow Lee. However this amount was not pleaded, but instead the sum of RM250,000 was averred to be credited into the 1st defendant's account following the promise in December 1998 (see para. 3(xiii) of amended defence and counterclaim of the 1st defendant). The fact that the 1st defendant amended the amount from RM250,000 to RM148,417.50 later is telling of the defendants' lack of *bona fides*.

I find that the defendants have not adduced evidence that would entitle them to rely on the defence of promissory estoppel taking into consideration that there is no evidence that the plaintiff had encouraged or induced them by verbal promises or assurances causing the defendants to default and thereby the plaintiff is estopped for an unconscionable conduct as alleged by them.

After examining the affidavit evidence wholly, I find that there are no triable issues and there is absence of a fair or reasonable probability of the defendants having a real or *bona fide* defence. I affirm the learned deputy registrar's decision and the defendants' appeal is dismissed with costs to be taxed on a solicitor and client basis.